In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 596

CLINTON E. JENCKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES IN OPPOSITION

This supplemental brief is in reply to "Petitioner's Reply to Government's Opposition" recently filed by petitioner in the above case. We do not agree with petitioner's contention that the recent decision of the Ninth Circuit in *Fisher* v. *United States*, February 15, 1956, presents any conflicts with the decision of the Fifth Circuit in this case warranting the grant of certiorari. We will comment briefly on each of the assertions of conflict made by petitioner.

1. *Production of F.B.I. documents.*

As we show in our brief in opposition (pp. 16-24), the question of the production of documents on motion of an adverse party made in the course of trial is one as to which a large discretion is to be allowed the trial judge, and his rulings in the premises will not be overturned in the absence of a clear and prejudicial abuse of discretion.

In *Fisher*, the Ninth Circuit held that the trial court had erred in refusing to require the production of certain receipts prepared by the F.B.I. and signed by an informant-witness for moneys paid to the informant for himself and his wife over the years 1942 to 1953. The informant had testified that the payments were for money he was "actually out." The defendant sought the receipts to show, if possible, that some of the payments were for services rendered. The Ninth Circuit thought it "obvious that if Mores and his wife were such extraordinarily devoted public servants [as to supply information to the F.B.I. without payment for their services] their evidence would have a powerful effect on the jury." Moreover, as that court read the record, "Without their evidence Fisher would not have been convicted." (Pet. Reply App. 8.) It was on these premises—which have no parallel in the instant case—that the Ninth Circuit found error in the refusal of the trial court to require the production of the receipts. We need not here inquire whether the premises of the Ninth Circuit found warrant in

the record before it, or whether its ruling on those premises was correct. For in any event the fact that the Ninth Circuit ruled as it did in *Fisher* does not show that the court below abused its discretion in denying the several motions to produce various documents in the different circumstances of this case. We stand on the statement of those circumstances contained in our brief in opposition (pp. 16-24) to show that the challenged rulings of the trial court lay well within its discretion and conformed to the governing principles as declared by this Court.

2. *The Charge.*

The Ninth Circuit thought that the instructions of the trial court in *Fisher* did not go far enough in the circumstances of that case in explaining to the jury the meaning of the terms "membership" and "affiliation" as those terms are used in Section 9(h) of the Labor Act. For the convenience of the Court, the relevant portion of the charge of the *Fisher* court, as it appears in the transcript of the trial, is appended hereto as Appendix A. We deal here with petitioner's contentions that the rulings of the Ninth Circuit on the charge are in conflict with the rulings of the Fifth Circuit in the instant case.

(a). *Membership.*

The *Fisher* trial court charged that the word "member" when applied to the Communist Party had no unusual or different meaning apart from

its normal or common usage, and added that Webster defines "member" as follows: "One of the persons composing a society, community, or party; an individual who belongs to an association."

The Ninth Circuit observed that "Membership is composed of a desire on the part of the person in question to belong to an organization and acceptance by the organization." It added that "certain actions are usually required such as paying dues, attending meetings and doing some of the work of the group." It held the trial court's instructions erroneous on the ground that: "The jury should have been reminded of the components of the term membership rather than be supplied with synonyms." (Pet.'s Rely App. 14, 15.)

The trial court in the *Jencks* case, it will be noted, did invite the jury's attention to certain of the components of membership, *i.e.*, attendance at meetings, holding office in the Party, and other conduct consistent only with membership (R. 1061, quoted in Govt. Br. in Opp. 25. Moreover, as the court below held (Pet. App. 81), the Government's total proof in *Jencks* that petitioner was a member of or affiliated with the Communist Party before and after the making of his non-Communist affidavit "was overwhelming." For example, it was shown that petitioner had headed the Southern section of the Communist Party in New Mexico and was a member of the State Board of the Communist Party in that state (Govt. Br. in Opp. 6-7). It is inconceivable that a person holding such important offices in the Party was not a member

of the Party. Under the circumstances, we submit that the charge in this case adequately informed the jury of the meaning of membership as used in the Act and that the decision of the court below should be distinguished from and regarded as not in conflict with that of the Ninth Circuit in *Fisher*.

We do not read the Ninth Circuit decision, as does petitioner (Pet.'s Reply 9), as requiring proof of the "formal requirements for membership as stated in [the Party's] constitution." Reference to the opinion of the Ninth Circuit (Pet.'s Reply App. 15) shows that the sentence from which the quotation is taken contains a statement of appellant's contention before that court and not a statement of the court's view. We could not lightly attribute to the Ninth Circuit so unrealistic a position. For Congress could hardly have intended that "membership" as used in the Labor Act, relating as it does to a covert conspiracy, requires proof of arbitrary, technical requirements set forth in a self-serving document prepared by that conspiracy and called its constitution. Indeed, as the Ninth Circuit itself noted (Pet.'s Reply App. 14), Congress, in the Communist Control Act of 1954, has explicitly provided that various types of circumstantial evidence shall be considered in determining membership in the Communist Party for purposes of that Act. 50 U.S.C. 844. And in the instant case the proof showed that the Party provided a special form of membership so that persons like petitioner who occupy

strategic positions in labor unions would not jeopardize their position by their membership in the Party (see Govt. Br. in Opp. 20).

(b). *Affiliation.*

The *Fisher* court charged that "affiliated," as used in the statute, when applied to the Communist Party had no unusual or different meaning apart from its normal and common usage, adding that Webster defined "affiliate" as follows: "To connect or associate one's self with; to adopt, hence usually to bring or receive into close connection; to ally."

The Ninth Circuit noted that this definition did not square with the definition of affiliation used by this Court in another context in *Bridges v. Wixon,* 326 U.S. 135. The Ninth Circuit did not itself rule as to the correct definition of affiliation for purposes of Section 9(h) of the Labor Act. Rather, it said equivocally (Pet.'s Reply App. 16):

> One who was in sympathy with the aims of the Communist Party might be an undesirable person to have as a labor leader since he might agree to call a political strike to further that Party's revolutionary ends. However, under the test of affiliation laid down in Bridges v. Wixon he could honestly answer that he was not affiliated with the Communist Party. If the test of affiliation given in that case is still applicable, and unless the Govern-

ment can distinguish the case, this instruction is erroneous.

In our brief in opposition we have met this invitation to distinguish *Bridges* v. *Wixon*. We there show (pp. 27-28) that the test of affiliation given in *Bridges* (*i.e.*, that to show affiliation adherence to the unlawful objectives of the Party must be established), derives from the requirements of the deportation statute involved in that case and is not applicable in the present context. The Labor Act lawfully provides that the services of the National Labor Relations Board shall not be available to unions whose officers are "affiliated" with the Communist Party for *any* purpose.

It should be noted, moreover, that the principal concern of the Ninth Circuit was that one who was only in sympathy with the Party might be convicted of affiliation under the charge of the trial court in the *Fisher* case. The charge in the instant case, unlike the *Fisher* charge, explicitly met this problem, for, in addition to giving the dictionary definition of the word, the court explicitly instructed the jury (R. 1063) that "Affiliation, as used in subsection (h) of Section 159 of Title 29 of the United States Code, means something less than membership but more than sympathy."

We note in closing that only a material and important conflict in decisions as to *both* "membership" and "affiliation" would support the grant

of certiorari in the instant case. Since, in view of the concurrent sentences, affirmance of the conviction on either count would require that the judgment be affirmed (see Govt. Br. in Opp. 28-29), there would otherwise be no assurance that the point as to which the decisions are deemed to be in conflict would be reached by this Court.

For the reasons stated, we adhere to our position that the writ of certiorari in *Jencks* should be denied.

Respectfully submitted.

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APPENDIX A

(Excerpt from charge of trial court in *Fisher* v. *United States*, Tr. 853-854)

As used in the indictment and statute the words "member" and "affiliated", when applied to the Communist Party, have no unusual or different meaning apart from their normal or common usage.

Webster's New International Dictionary defines "member" and "affiliated", when applied to the Communist Party, have no unusual or different meaning apart from their normal or common usage.*

Webster's New International Dictionary defines "member" as follows:

> "One of the persons composing a society, community, or party; an individual who belongs to an association;"

"Affiliate" is defined as follows:

> "To connect or associate one's self with: to adopt, hence usually to bring or receive into close connection: to ally."

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* Apparently this paragraph of the charge was erroneously included by the reporter.

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